No. 82-1327

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS

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In their zeal to defend the Ninth Circuit's construction of the term federal "activit[y] directly affecting the coastal zone," as used in Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1) (1976), respondents clearly reveal the significance of the issue presented by the petition in this case.

1. Respondents attempt to create the impression that the lower courts' interpretation of Section 307(c)(1) only imposes the requirement for "an environmental review" at the leasing stage of an OCS project, comparable to that required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976). (Opp. 13-18). If this case involved no more than NEPA-type consideration of state CZMA programs, petitioners

would not be here. NEPA itself is broad enough to require consideration of such programs.[1]

Respondents reveal the significance of the lower courts' construction of Section 307(c)(1) when they assert that a broad definition of "directly affecting" is necessary to allow States to exercise "comprehensive coastal management authority" under Section 307(c)(1). (Opp. 2; *see also id.* at 20-21). Indeed, respondents themselves describe NEPA as "a completely distinct statute which . . . imposes only 'procedural' requirements and 'does not prescribe the substantive content of federal decisions' as the CZMA does." (Opp. 14 n.21).

Respondents go even farther in the cross-petition which they have filed seeking review of the Ninth Circuit's interpretation of the phrase "maximum extent practicable." Recognizing that the lower court has diluted the authority which they seek under Section 307(c)(1), they argue that the matter was "Too Important" to be made in the context of this case (Cross-petition 6), because it detracts from the "comprehensive authority" which they assert Congress gave them under Section 307(c)(1) (*id.* at 6-7), and thus "would deprive coastal states of the strong management role Congress granted them in enacting the CZMA" (*id.* at 10).

Thus, we deal here with the State's assertion of substantive authority over the OCS. This is a matter which this Court has repeatedly addressed in a number of cases[2] and which it should address again here to resolve the ambiguities created by the Ninth Circuit's construction of the CZMA.

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[1] *See Massachusetts* v. *Andrus*, 594 F.2d 872, 884-86 (1st Cir. 1979) (NEPA consideration of alternative management for the OCS under the Marine Sanctuaries Act, 16 U.S.C. § 1431); *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1376, 1379 (2d Cir. 1977) *cert. denied*, 434 U.S. 1064 (1978) (EIS considered state and local regulatory requirements concerning pipeline placement.)

[2] *See, e.g., United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Maine*, 420 U.S. 515 (1975).

2. The Ninth Circuit clearly realized that its requirement of a consistency determination prior to OCS lease sales "unavoidably raises additional issues," and that "[f]oremost among these is whether consistency . . . means simply conformity to the program in the manner deemed appropriate by the state concerned." (WOGA petn. 21a). Thus, the court held that final authority to determine consistency "must reside in the Executive Branch of the federal government." However, the court acknowledged that it would be necessary in the future to proceed on a case-by-case basis to determine the required degree of consistency since "each situation" must be handled "with care and sensitivity to the concerns of the state and the nation." (*Id.* at 24a).

This Solomon-like judgment—broadly interpreting "directly affecting" to give States an opportunity in every case to probe a consistency determination, while leaving final decisional authority in the hands of the federal government—has already led to significant delay and disruption of the OCS program. Since the filing of our petition,[1] the United States District Court for the District of Massachusetts in *Conservation Law Foundation* v. *Watt*, No. 83-0506-MA, (unreported, March 28, 1983), *appeal pending*, No. 83-____ (1st Cir.), upheld the claims of a State and environmental groups that the consistency determination prepared for OCS Sale No. 52 (North Atlantic) did not prove consistency to the "maximum extent practicable" and thereby preliminarily enjoined that sale. Three days later, environmental plaintiffs, fishermen groups, and others filed suit making similar allegations in connection with OCS Sale No. 70 (St. George Basin). *Village of False Pass* v. *Watt*, No. A83-176 (D. Alaska).[2]

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[1] WOGA's petition noted the existence of four Section 307(c)(1) cases which followed in the wake of the district court's decision in this case. (WOGA petn. 9 n.10).

[2] Respondents refer to a representation made by the American Petroleum Institute to the D.C. Circuit in connection with its current consideration of Secretary Watt's five-year OCS leasing program in

Absent the grant of certiorari in this case, there can be little doubt that such litigation will continue. As the federal petitioners have informed this Court, the Department of the Interior has felt obliged to prepare consistency determinations for all OCS lease sales, since the majority of the controversial ones lie offshore States that are included within the Ninth Circuit. Future litigation concerning Section 307(c)(1), therefore, will not raise the question whether a lease sale "directly affects" the coastal zone and thus requires the preparation of a consistency determination, but instead will present issues concerning the adequacy of a determination that has been made. WOGA believes that it has shown in its petition and is confident that it can show on the merits that the Ninth Circuit erred in its construction of "directly affecting." This case, in all probability, will be the last opportunity for the Court to correct that error and avoid unnecessary CZMA-based litigation concerning OCS leasing.[1]

California v. *Watt*, No. 82-1822, *et al.*, that the Ninth Circuit's decision has resulted in only insignificant revisions in the scheduling of several lease sales. (Opp. 26-27). As respondents are fully aware, that representation had to do solely with the changes in the five-year leasing schedule associated with the preparation of consistency determinations. It was not a comment upon the litigation-induced delays of individual lease sales brought about by later judicial scrutiny of those consistency determinations.

[1] The federal defendants have appealed the district court's decision in *Kean* v. *Watt*, No. 82-2420 (D.N.J.) (Sale No. RS-2), which involves an OSC lease sale conducted prior to the Ninth Circuit's decision and thus went forward without a consistency determination. No. 82-5752 (3d Cir.). However, none of the tracts whose leasing the State of New Jersey opposes in that case were bid upon when the sale was conducted. The federal defendants have accordingly taken the position in the Third Circuit that their appeal of the trial court's broad interpretation of Section 307(c)(1), as well as a cross-appeal involving another issue concerning the scope of Section 307(c)(1), should be dismissed as moot.

3. Respondents assure this Court that the possibility of serious conflict between the States and the federal government over OCS leasing "is simply not supported" because state CZMA programs have been subjected to federal scrutiny prior to their approval and have been designed to allow for adequate consideration of the national interest in energy development. (Opp. 2-3, 28). The specific provisions of the California program upon which the State relied in challenging the Secretary of the Interior's Santa Maria Basin leasing decision themselves show the hollowness of this claim.

California referred below solely to Sections 30230 and 30240 of the California Coastal Act (Cal. Pub. Res. Code § 30,000 *et seq.*), both of which are incorporated within the California Coastal Management Program (CCMP), as barring the leasing of the disputed tracts. Those provisions state generally that

> "[m]arine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance"

and give no guidance as to the manner in which they will be applied in any particular case.

Similarly, Section 30260 of the Coastal Act, the provision of the CCMP which supposedly provides adequate consideration of the national interest in energy facility siting, states only that such energy facilities "may . . . be permitted . . . if . . . to do otherwise would adversely affect the public welfare." In this case, the California Coastal Commission simply found that the "public welfare" would not be adversely affected by deleting the northern Santa Maria Basin tracts from Sale No. 53. (C.R. 85; A.R. 217 w).

Thus, the CCMP itself resolves none of the policy conflicts associated with OCS development or other coastal-related activities.[1] Accordingly, the vague terms of California's coastal

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[1] Respondents' argument that the courts in *American Petroleum Institute* v. *Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), contemplated the use of such broad provisions

zone management program, like that of other states, only invite future litigation.

4a. Turning to the merits, it is first necessary to correct respondents' misstatements with respect to the position taken by the federal government as to Section 307(c)(1). Prior to 1979, the Department of the Interior did take the broad position that it was generally exempt from Section 307(c)(1) in the light of indications in the CZMA and the OCSLA that consistency was not required at the leasing stage of an OCS project. The National Oceanic and Atmospheric Administration (NOAA), the agency within the Department of Commerce charged with enforcement of the CZMA, disagreed. Moreover, NOAA had initially interpreted the phrase "directly affecting" as requiring CZMA consistency analysis for any effects of federal activities upon the coastal zone, whether "primary, secondary [or] cumulative" in nature. 43 Fed.Reg. 10518-19 1978).

On April 19, 1979, the Department of Justice issued an opinion rejecting Interior's broad view that it was generally exempt from Section 307(c)(1). However, it also stated that it was unable "to concur in [NOAA's] interpretation that would dilute 'directly' first to 'significantly' and then to 'primarily, secondarily, and cumulative.' " (C.R. 85; A.R. 109 w at 14).

Pursuant to this Department of Justice opinion, NOAA withdrew its broad definition of the term "directly affecting." 44 Fed. Reg. 37,142 (1979).

Interior also changed its interpretation of Section 307(c)(1) and began scrutinizing every lease sale and the "preliminary activities" associated with that early stage of an OCS project to determine whether they involved any "direct effect" upon the

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pursuant to Section 307(c)(1) to forestall federal activities, like an OCS lease sale (Opp. 3, 28), ignores the holding of those cases. Both the district and appellate court expressly refused to reach the issue of the enforceability of the CCMP in a Section 307 context, terming it "wholly speculative and thus not ripe for review." 456 F. Supp. at 897, 899, 903, *aff'd*, 609 F.2d at 1310.

coastal zone. (*See* WOGA petn. 11-12). Although on at least one occasion such preliminary activities were deemed to "directly affect" the coastal zone,[1] in this case, neither Interior nor the courts found that such preliminary activities "directly affect[ed]" the coastal zone.[2]

Thus, since the Department of Justice 1979 opinion, all agencies of the federal government have held the same view concerning the proper construction of the statute.[3] It is this view which the federal defendants urged below and which the lower courts rejected.

b. Respondents continue to offer no definition of the term "directly" which gives it any content. Although respondents now contend that the " 'direct effects' of a lease are the intended uses of the property leased—in this case oil and gas development on the [OCS]" (Opp. 10), they also argue that the Department's consistency determination must extend to such matters as the use of pipelines or tankers for transporting oil and the "heavy industrial activities associated with OCS development" (Opp. 15 n.23), presumably a reference to the "OCS-

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[1] OCS Sale No. BF, the subject of litigation in *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980), involved the possible construction of gravel islands to support later exploration platforms in areas immediately adjoining the Alaska coastal zone during the leasing stage of the project. Thus, in 1979 a consistency determination pursuant to Section 307(c)(1) was provided to the State of Alaska to assess the coastal zone impacts of this particular portion of the Sale No. BF project.

[2] Having accepted the proposition that there is no general exemption for OCS leasing activities from Section 307(c)(1), the Department of the Interior has responded to the legislative history of the OCSLA described by respondents at pp. 21-22 of their opposition.

[3] Respondents' reliance upon a Department of Commerce 1980 mediation report (Opp. 6 n.7) was properly not relied upon by the lower courts. As petitioners pointed out below, that report was specifically disapproved by the Secretary of Commerce as being beyond the mediator's jurisdiction. (Letter of Secretary Klutznick to Michael Fisher, April 9, 1980, Defendants Exh. L-AA.)

related onshore facilities" which the lower courts found were "direct effects" of leasing. (WOGA petn. 73a). In short, like both the district court and the Ninth Circuit, respondents adhere to the view that any effect that may ultimately occur during an OCS project is a "direct effect" of leasing.

c. Respondents argue that addressing consistency issues at the exploration and development-production stages of OCS projects will mean that CZMA "review is confined to plans for specific tracts submitted by each lessee" (Opp. 16), and will raise less the question of "whether drilling will proceed on the site than where and how it will proceed" (*Id.* at 5). There are several answers to this argument: First, until oil or gas is discovered on particular tracts, there is no way intelligently to address the pipeline placement, onshore infrastructure, and other issues associated with the later stages of OCS oil and gas production and development.[1] Second, an OCS lessee must comply with the CZMA at the later exploration or development/production stages or otherwise face disapproval of the plans that are necessary to proceed with those stages.[2] Third, even if Section 307(c)(3)(B) permits later-stage CZMA analysis to address only the question of "how," not "whether" OCS development should proceed, it seems unthinkable that Congress so carefully defined the limited "how" authority under Section 307(c)(3)(B), while silently conveying the much broader "whether" authority under the general terms of Section 307(c)(1).

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[1] *See County of Suffolk* v. *Secretary of the Interior*, 562 F.2d at 1375-81, reversing a district court's order requiring even NEPA-type speculation about such issues at the leasing stage of an OCS project.

[2] Respondents observe that lessees often pay significant sums for leases, and cite this fact as though it demonstrates a clear nexus between leasing and the production of oil and gas from a particular OCS tract. (Opp. 12 & n.16). Respondents fail to note that, to date, in the majority of frontier areas, despite the expenditure of huge amounts by lessees for the acquisition of leases (*see* WOGA Petn. 13-14), no oil or gas in producible quantities has been discovered.

d. Respondents cite a 1971 Senate report which refers to a "functional interrelationship" between federal activities and the coastal zone (Opp. 24), and argue that this supports a broad reading of the "directly affecting" provision of Section 307(c)(1). However, the "functional interrelationship" referred to by the Senate report in 1971 concerned federal activities within those few acres of federal waters which for unusual reasons might divide portions of a state's coastal zone.[1] At no point in the legislative history of the original 1972 CZMA nor the 1976 amendments, when Section 307(c) was modified to deal with OCS projects, did Congress assume that all federal activities anywhere outside a state's coastal zone which might someday have a "functional interrelationship" with it would be subject to Section 307(c)(1) consistency review.[2]

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[1] S. Rep. No. 526, 92d Cong., 1st Sess. 20 (1971).

[2] Respondents' reference to the Congress' scrutiny of NOAA's 1981 regulation on "directly affecting" (Opp. 23) is of no significance here. The sponsors of the resolutions of disapproval introduced in the Congress relied upon the district court's decision in this case. *See, e.g.*, Hearings before the Subcomm. on Oceanography of the House Committee on Merchant Marine and Fisheries, 97th Cong., 1st Sess. 39-40, (1981) (statement of Rep. Panetta). Accordingly, the 1981 congressional resolutions, which were never voted on on the floor of either House, do not provide any support for the decision below.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant a writ of certiorari and hear this case on the merits.

Respectfully submitted,

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